

Nos. 15,256 and 15,257

IN THE

United States Court of Appeals

For the Ninth Circuit

MARGUERITE FERRANDO and FRED FERRANDO,
co-executors of the Last Will and Testa-
ment of Mario Ferrando, deceased,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 15,256

EDWARD FERRARI and GEORGE FERRARI, co-
executors of the Last Will and Testa-
ment of Luigi Ferrari, deceased,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 15,257

On Appeal from the Judgments of the United States District
Court for the Northern District of California.

BRIEF FOR THE APPELLEE.

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No. 15,257

**On Appeal from the Judgments of the United States District
Court for the Northern District of California.**

BRIEF FOR THE APPELLEE.

OPINIONS BELOW.

The opinion (R. 17), findings of fact and conclu-
sions of law (R. 21-25) of the District Court in No.
15,256 are not reported. The opinion (R. 20-22), find-

ings of fact and conclusions of law (R. 24-28) of the District Court in No. 15,257 are not reported.

JURISDICTION.

These appeals involve federal estate taxes.

In No. 15,256, the jurisdictional facts are as follows: The taxes in dispute were paid on January 4, 1952. On December 10, 1952, the executors filed with the District Director of Internal Revenue at San Francisco, California, a claim for refund of the additions to tax collected. (R. 23.) This claim was rejected on October 7, 1953. (R. 24.) Within the time provided in Section 6532 of the Internal Revenue Code of 1954, and on April 20, 1955, the executors brought an action in the District Court for recovery of the taxes paid. (R. 4-7.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346. Judgment was entered on June 22, 1956. (R. 25-26.) Within sixty days and on July 19, 1956, a notice of appeal was filed. (R. 26.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

In No. 15,257, the jurisdictional facts are as follows: The taxes in dispute were paid as follows: \$3,982.13 on March 1, 1951, and \$25,257.83 on December 14, 1951. (R. 6, 26.) Claim for refund was filed on February 16, 1953 (R. 27), and was rejected on October 7, 1953. (R. 27.) Within the time provided in Section 6532 of the Internal Revenue Code of 1954, and on April 20, 1955, the executors brought an action in the District Court for recovery of the taxes paid.

(R. 4-7.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346. Judgment was entered on June 22, 1956. (R. 29-30.) Within sixty days and on July 19, 1956, a notice of appeal was filed. (R. 30.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED.

Whether the District Court was correct in holding that the failure to file estate tax returns within the period prescribed by law was due to wilful neglect rather than reasonable cause.

STATUTE INVOLVED.

The pertinent statutory provisions are set forth in the Appendix, *infra*.

STATEMENT.

The District Court made findings of fact and conclusions of law in each case which may be summarized as follows:

No. 15,256—the Ferrando case. Mario Ferrando died on April 20, 1947. Marguerite Ferrando and Fred Ferrando were appointed co-executors of the last will and testament of Mario Ferrando on February 13, 1948. They did not file a federal estate tax return with the office of the United States Collector of Internal Revenue for the First District of California,

San Francisco, California, on or before July 20, 1948. They did not receive an extension of time to allow them to file a federal estate tax return later than July 20, 1948. (R. 21-22.)

The executors employed an attorney to prepare and file a federal estate tax return. This attorney failed to prepare and file the return prior to February 7, 1949. The executors knew that a federal estate tax return was required and that an estate tax would have to be paid. They made no attempt to determine whether the attorney employed by them was acting with due diligence in preparing the estate tax return or to become familiar with their duties and obligations as executors under the will of Mario Ferrando. (R. 22.)

The executors did not attempt to determine whether their attorney filed a federal estate tax return within the period prescribed by law. Their conduct failed to discharge the duty, placed upon them by Section 821 of the Internal Revenue Code of 1939, to prepare and file a federal estate tax return. There was no reasonable cause for their failure to file a federal estate tax return within the time prescribed by law and their failure to do so was due to wilful neglect. (R. 23.)

No. 15,257—the Ferrari case. Luigi Ferrari died on August 2, 1946, and thereafter on August 30, 1946, Edward Ferrari and George Ferrari were duly appointed as co-executors of his last will and testament. The executors obtained an extension of time to and including December 2, 1947, within which to file the federal estate tax return for the estate of Luigi Fer-

rari required by the Internal Revenue Code of 1939. (R. 25.)

On April 22, 1949, a federal estate tax return was filed with the office of the Collector of Internal Revenue for the First District of California, San Francisco, California, for the estate of Luigi Ferrari. The executors did not file a return as prescribed by law prior to that date. (R. 25.)

The executors employed an attorney to prepare and file the estate tax return. The failure to file the return within the allowed period was due to the attorney's wilful neglect. The executors knew that an estate tax return was required and that an estate tax would have to be paid. They made no attempt to determine if their attorney was acting with diligence in preparing and filing the return or to determine whether a return had been filed within the period prescribed by law. Their conduct failed to discharge the duty, placed upon them by Section 821 of the Internal Revenue Code of 1939, to prepare and file a federal estate tax return. They were guilty of wilful neglect in failing to determine whether their attorney was acting with diligence in the preparation and filing of the return. There was no reasonable cause for their failure to file a federal estate tax return within the time prescribed. (R. 25-26.)

In each case additions to tax for failure to file the required returns within the prescribed period were assessed pursuant to Section 3612(d)(1) of the Internal Revenue Code of 1939. (R. 23, No. 15,256; R. 26, No. 15,257.) The District Court concluded in each

case that the additions to tax were properly assessed pursuant to the provisions of Section 3612(d)(1). (R. 24-25, No. 15,256; R. 28, No. 15,257.)

SUMMARY OF ARGUMENT.

The District Court found in each case that the failure of the executors to file the required estate tax return within the period prescribed by law was due to wilful neglect rather than reasonable cause. The burden of establishing the existence of reasonable cause was on the executors and the finding of fact that this was not established is not clearly erroneous and should not be disturbed on appeal.

The evidence fully supports the District Court's findings. In each case, the record shows that the executors knew that estate tax returns had to be filed and that estate taxes would have to be paid. It also establishes that the executors in each case did no more than hire an attorney to handle the affairs of the estate. Thereafter, they failed to act with any diligence whatever concerning the filing of the required returns. They did not endeavor to ascertain whether the attorney was preparing the returns for filing or had in fact filed the returns. The District Court, having the opportunity to observe the witnesses as they testified, acted well within its discretion in remaining unconvinced by the witnesses in their attempts to show ignorance about matters relating to the filing of the returns.

These are not cases like those in which it has been held that *bona fide* reliance on the advice of competent tax counsel to the effect that tax returns are not required under the law constitutes reasonable cause. Rather, in these cases, where there was knowledge that returns were required, the delays of over sixteen months in one case and over six months in the other can not be explained away by merely alleging that the task of preparing and filing the returns was delegated to another. A period of fifteen months after the death of a decedent is allowed for filing an estate tax return. Congress has provided for additions to tax when the return is not timely filed. In order to avoid the imposition of these additions, reasonable cause for the delay must be established. It can not be said that one acts with reasonable business care and prudence (the standard for determining whether reasonable cause exists) when he merely delegates the responsibility of filing the return to another and thereafter does no more. The duty owed the United States is greater than that. In so holding, the District Court was correct and should be affirmed.

ARGUMENT.

THE DISTRICT COURT CORRECTLY HELD THAT THE EXECUTORS' FAILURE TO FILE ESTATE TAX RETURNS WITHIN THE TIME REQUIRED WAS DUE TO WILFUL NEGLECT RATHER THAN REASONABLE CAUSE.

The decedent, Luigi Ferrari, died on August 2, 1946. (R. 25, No. 15,257.) Under the applicable law and Regulations, a federal estate tax return for his

estate was due to be filed within fifteen months from the date of his death. (November 2, 1947.) Section 821, Internal Revenue Code of 1939 (Appendix, *infra*), and Section 81.63, Treasury Regulations 105, promulgated under the Internal Revenue Code of 1939. A one-month extension of the time in which the return was required to be filed was granted, so that the return was due on December 2, 1947. The return was not filed until April 22, 1949, over sixteen months late. (R. 25, No. 15,257.)

The decedent, Mario Ferrando, died on April 20, 1947. (R. 21-22, No. 15,256.) Under the applicable Regulations, a federal estate tax return for his estate was similarly due to be filed within fifteen months from the date of his death. (July 20, 1948.) The return was not filed until February 7, 1949. (R. 22, No. 15,256.)

The District Court found that, in each of the cases, the failure to file the estate tax returns within the prescribed time was not due to reasonable cause, but to wilful neglect and that additions to tax pursuant to Section 3612(d)(1) of the Internal Revenue Code of 1939 (Appendix, *infra*), were properly imposed. (R. 23, 24, 25, No. 15,256; R. 26, 27, 28, No. 15,257.)

Whether the failure to file tax returns within the time required by law is due to reasonable cause rather than wilful neglect is a question of fact which is primarily for the decision of the trier of fact, the District Court. The burden of establishing the existence of "reasonable cause" is on the taxpayers. *Coates v. Commissioner*, 234 F. 2d 459 (C.A. 8th); *Sanders v.*

Commissioner, 225 F. 2d 629, 637 (C.A. 10th); *Lee v. Commissioner*, 227 F. 2d 181, 184 (C.A. 5th). In these cases, the executors have not carried that burden to the satisfaction of the District Court. Rather, the District Court, which had the opportunity of seeing and hearing the witnesses as they testified, decided in each case that there had been no showing that the failure to file the estate tax returns of the two decedents was due to reasonable cause rather than wilful neglect. (R. 17-20, No. 15,256; R. 20-22, No. 15,257.) The District Court's findings in this connection should not be disturbed unless clearly erroneous. Rule 52(a), Federal Rules of Civil Procedure; *United States v. Yellow Cab Co.*, 338 U.S 338; *Pacific Homes v. United States*, 230 F. 2d 755 (C.A. 9th). And, we submit, that not only are the findings of the District Court not clearly erroneous, but that they are amply supported by the evidence and should be affirmed.

Ferrando Estate.

The District Court found that the executors of the Ferrando estate made no attempt to become familiar with their duties and obligations as executors and that they knew that an estate tax return must be filed and a tax was required to be paid. (R. 22, No. 15,256.) It also found that they made no attempt to determine whether their attorney filed an estate tax return within the prescribed period. (R. 23, No. 15,256.) These findings, in themselves, support the finding that the failure to file the return, within the period allowed, and the filing of the return more than six months after the expiration of that period, was

due to wilful neglect rather than reasonable cause. That these are proper findings is clear from the evidence.

Fred Ferrando was a businessman and was generally familiar with the requirements of state and federal law that tax returns were required to be filed at a designated time. (II R. 35, 41-43.)¹ When he hired the attorney, Cosgrove, he did not hire him as a tax expert. (II R. 43, 44.) They conversed about the estate tax liability within a week after the death of the decedent. (II R. 37, 43.) And Ferrando knew that taxes would have to be paid on his father's estate. (II R. 45.) But, in spite of this knowledge, Ferrando made no effort to ascertain his responsibilities in connection with the estate. Cosgrove did not outline any of the procedures that would have to be taken (II R. 66) and Ferrando made no inquiries of anyone else. (II R. 44.) When asked whether he knew that there was a fifteen-month period within which a return had to be filed, he answered (II R. 44) "No, I don't remember; I don't remember." He replied in the same manner, when asked if he questioned Cosgrove as to when an estate tax return would be due. (II R. 44.) However, he recalled that an inventory appraisal in connection with the estate had been filed on October 14, 1948 (II R. 45-46), but did not remember whether he asked Cosgrove at that time about the filing of the federal estate tax return. He said (II R. 46) "I know this, that I had called him on the telephone and asked

¹References to the transcript of testimony in both cases are cited (II R.).

him if the estate was finished yet and he said everything is being taken care of. *I just left it at that.*" (Emphasis supplied.)

We submit that it is not an exercise of reasonable business care and prudence to take such a haphazard approach to one's responsibilities and duties as an executor. And particularly when it is noted that on the crucial matters relating to the federal estate tax return and taxes Mr. Ferrando had no memory whatever, it was well within the discretion of the District Court, which observed him as he testified, to refuse to believe the testimony relating to his ignorance of these matters.² *Showell v. Commissioner*, 238 F. 2d 148, 152 (C.A. 9th), rehearing denied, 238 F. 2d 155. The District Court's findings that the failure to file the estate tax return within the required time was not due to reasonable cause, but was due to wilful neglect are fully supported by the evidence and should not, therefore, be upset.

Ferrari Estate.

In the *Ferrari* case, the District Court made findings similar to those in the *Ferrando* case. (R. 24-28, No. 15,257.) The claim of the executors in this case is that they signed what purported to be an estate tax return on October 31, 1947, prior to the time that

²The estate tax return was filed on February 7, 1949, but was dated July 15, 1948. A check for the taxes, written in February, 1949, was dated July 15, 1948, but the date was not put on by Ferrando. He testified that although it was not his practice to omit the date when writing checks, he did so in this instance but again could not remember why. (II R. 47-49, 51, 53-54.) This, in itself, casts some doubt on the reliability of his testimony, which the District Court could have taken into account.

it was due. The District Court, however, in response to this contention stated (R. 22, No. 15,257):

But, their testimony on this point is so equivocal and lacking in forthrightness that it is unacceptable. The only conclusion that can be drawn from the record made is that plaintiffs have failed to sustain the burden of showing that the delinquent filing was due to reasonable cause and not to wilful neglect.

The reasonableness of this statement by the District Court is shown by the fact that the executors' contention is contradicted by other evidence in the record.³

Although George Ferrari testified that he signed "estate tax papers" (II R. 180) (intending to convey the impression that he thought a return had been filed) and was told by Cosgrove that "the time was almost up" (II R. 179), when a neighbor told him about the fifteen-month limitation for filing the return in 1948 (after the return was due), he immediately went to Cosgrove's office to inquire about the fifteen-month period. (II R. 188.) It is obvious that there would have been no need for this concern, if Mr. Ferrari had an honest belief that he had filed the return in October, 1947. Furthermore, although Ferrari admitted (II R. 196) that Cosgrove told him, in 1947, that he was going to get an extension of time (which Ferrari claimed he thought was an extension of time in which to pay the tax), he did not ask if an

³The District Court, in its opinion, refers to the fact that an extension of time was secured until December 2, 1949. (R. 20, 21, No. 15,257.) This is apparently a typographical error. Its findings (R. 25, No. 15,257) show the proper date, December 2, 1947.

extension was in fact secured or, if so, how long an extension was granted. (II R. 196-198.) The tax was not paid or the return filed until April, 1949. (R. 25, No. 15,257; II R. 122, 143, 200.) This too shows a lack of reasonable care on the part of the executors. Still another indication that the contention that the Ferraris believed that a return was filed in 1947 is not valid is found in the fact that it was only sometime in 1949 when the executors first became concerned over the payment of the tax. (II R. 200.) But the executors purportedly knew in 1947 that the estate tax due would be around \$100,000. (II R. 179, 217.) And, like the executors in the Ferrando case, the executors of the Ferrari estate did not ask Cosgrove whether a return was filed. (II R. 130.)

Certainly in the light of this evidence, the District Court was more than justified in exercising its "right to remain unconvinced" by the testimony offered on behalf of the Ferrari estate.⁴ *Showell v. Commissioner*, *supra*. The record presents a picture of confusion from which only one valid conclusion can be drawn—the failure to file the estate tax return for the decedent Ferrari was due to wilful neglect and not reasonable cause. We submit that the District Court's findings to this effect are the only ones that could be made on this record and must be sustained.

⁴The District Court was entitled to disregard any of the testimony of the attorney, Cosgrove, since he has a substantial financial interest in the outcome of the litigation. Having agreed to reimburse the executors for any losses they will incur as a result of the imposition of additions to tax for late filing of the returns (II R. 80-81, 124-125), it was to his personal advantage to be as favorable to the estates as possible in his testimony.

The contention of the executors is that their reliance on their attorney, Lloyd Cosgrove, absolves them of all liability for the failure to file the estate tax returns of their decedents within the time prescribed by the Code and Regulations. They cite in support of their argument (Br. 27) *Fisk v. Commissioner*, 203 F. 2d 358 (C.A. 6th). But an examination of this case will reveal immediately that the situations are not analogous. The estate tax return in the *Fisk* case was mailed on the date that it was due and received by the Collector only *one day* late, while the returns in these cases were filed over *sixteen months* late in the *Ferrari* case and over *six months* late in the *Ferrando* case. It is at once obvious that, while a delay of one day in certain circumstances might be regarded as reasonable, delays of sixteen months and six months can not be viewed in the same light.⁵

Neither are these cases similar to those, cited by the executors, in which taxpayers, faced with complicated problems of ascertaining whether they came under special statutory provisions (such as the personal holding company section of the Code), relied upon advice of counsel to the effect that they were not required to file returns. Cf. *Hatfried, Inc. v. Commissioner*, 162 F. 2d 628 (C.A. 3d); *Haywood Lumber & Min. Co. v. Commissioner*, 178 F. 2d 769 (C.A. 2d).

⁵Compare *Cronin's Estate v. Commissioner*, 164 F. 2d 561, 566, where the Sixth Circuit held that reasonable cause for late filing of an estate tax return was not established by a claim that the data for the return could not be assembled because of the illness of the decedent's secretary and that the estate's attorney did not know of the time limit for filing returns.

In such circumstances, it has been held that *bona fide* reliance on the advice of competent tax counsel as to whether returns were required to be filed constituted reasonable cause.⁶ No such reliance exists in the cases at bar. There was no doubt that estate tax returns were required and there is no evidence that the executors' counsel advised them that returns were not required. On the contrary, the whole theory of the executors' cases is that they were aware that they were required to file estate tax returns. In these circumstances, they are responsible for the negligence of the person to whom they delegated their duties. *Berlin v. Commissioner*,⁷ 59 F. 2d 996 (C.A. 2d), certiorari denied, 287 U.S. 642.

⁶It should be noted, however, that the advice of the tax adviser must be formally sought and that consideration to the problem of whether returns were required must have been given by the tax adviser. Cf. *Credit Bureau of Greater N. Y. v. Commissioner*, 162 F. 2d 7, 9 (C.A. 2d). A statement that tax matters were left to an accountant is not a sufficient showing of reasonable cause to avoid the imposition of additions to tax. *Home Guaranty Abstract Co. v. Commissioner*, 8 T.C. 617, 622.

⁷The *Berlin* case held that a taxpayer who relied upon a tax adviser to file his income tax returns took the benefits of his agent's actions in his behalf "*cum onere* and * * * [was] chargeable with any willful neglect ascribable to his agent." 59 F. 2d 996, 997. This holding was modified somewhat in a later case (*Haywood Lumber & Min. Co. v. Commissioner*, 178 F. 2d 769 (C.A. 2d)), but only as regards "cases which hold that advice sought and received in good faith from a competent adviser constitutes reasonable cause for failure to file the required return * * *". 178 F. 769, 771. As pointed out above, these cases are not like such a case but rather are situations exactly parallel to the *Berlin* case. See also *Woolsey v. United States*, 138 F. Supp. 952 (N.D. N.Y.), affirmed *per curiam*, 230 F. 2d 948 (C.A. 2d), certiorari denied, 352 U.S. 832.

In the final analysis, the issue in these cases is whether a person charged with the duty of filing returns and knowing that he has this duty can relieve himself of any responsibility for an untimely filing by delegating it to another. These cases present extreme examples. For, here, once counsel had been hired for the estates the executors apparently went their own way, without regard to whether the attorney was properly handling their affairs.⁸ There is not even any evidence that inquiries were made by the executors as to whether the returns were filed. Certainly, such action cannot be deemed "reasonable cause". The care required by the statute is reasonable business care and prudence. *Sanders v. Commissioner*, 225 F. 2d 629, 636-637 (C.A. 10th). And, we submit, that the duty owed the United States by its taxpayers is

⁸A reading of the record establishes beyond a doubt that the attorney for the estates involved did not exercise reasonable care as regards the filing of the returns. Similarly, the record shows that the actions of the executors were also not the exercise of reasonable business care and prudence. The only question in this case is whether the failure to file the returns within the allowed period was, in fact, reasonable. To know or to learn that an estate tax return is due within fifteen months of the decedent's death does not call for the exercise of technical skill or complicated tax knowledge. And as the District Court said (R. 19, No. 15,256):

* * * in these days when the filing of a variety of tax returns is a commonplace experience, it is not asking too much of an executor, who is aware that an estate tax must be paid, that he ascertain the time when the return and the tax are due. Ordinary prudence demands that he do so, for he must make sure that the necessary information and funds are available for a timely filing of the return and payment of the tax. Plaintiffs' neglect of this responsibility permitted their attorney to push aside the work of preparing and filing the estate tax return in favor of more pressing matters. Attentiveness on the part of plaintiffs would have prompted a timely filing.

not reasonably exercised by merely delegating to another the responsibility for seeing that the duty is carried out. *Home Guaranty Abstract Co. v. Commissioner, supra; Davenport v. Commissioner*, 6 T.C. 62, 67. In recognizing this and giving effect to the mandate of Congress, the District Court was correct and should be affirmed.

CONCLUSION.

For the reasons stated the judgments of the District Court should be affirmed.

Respectfully submitted,

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(Appendix Follows.)

Appendix.

Appendix

Internal Revenue Code of 1939:

SEC. 821. RETURNS.

(a) *Requirement.*—

(1) *Returns by executor.*—In all cases where the gross estate at the death of a citizen or resident exceeds the amount of the specific exemption provided in section 812 (a), the executor shall make a return under oath in duplicate, setting forth (1) the value of the gross estate of the decedent at the time of his death; (2) the deductions allowed under section 812; (3) the value of the net estate of the decedent as defined in section 812; and (4) the tax paid or payable thereon; or such part of such information as may at the time be ascertainable and such supplemental data as may be necessary to establish the correct tax.

* * *

(b) *Time for Filing.*—The return required of the executor under subsection (a) shall be filed at such times and in such manner as may be required by regulations made pursuant to law.

* * *

(26 U.S.C. 1952 ed., Sec. 821.)

SEC. 3612. RETURNS EXECUTED BY COMMISSIONER OR COLLECTOR.

* * *

(d) *Additions to Tax.*—

(1) *Failure to file return.*—In case of any failure to make and file a return or list within

the time prescribed by law, or prescribed by the Commissioner or the collector in pursuance of law, the Commissioner shall add to the tax 25 per centum of its amount, except that when a return is filed after such time and it is shown that the failure to file it was due to a reasonable cause and not to wilful neglect, no such addition shall be made to the tax: *Provided*, That in the case of a failure to make and file a return required by law, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, if the last date so prescribed for filing the return is after August 30, 1935, then there shall be added to the tax, in lieu of such 25 per centum: 5 per centum if the failure is for not more than 30 days, with an additional 5 per centum for each additional 30 days or fraction thereof during which failure continues, not to exceed 25 per centum in the aggregate.

* * *

(26 U.S.C. 1952 ed., Sec. 3612.)